Supreme Court, U.S.
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No. 95-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the existence and scope of the psychotherapist/patient privilege recognized by the Seventh Circuit in this case comply with Rule 501 of the Federal Rules of Evidence.

2. Whether the Seventh Circuit's decision to recognize the existence of a psychotherapist/patient privilege within the context of this case conflicts with decisions from other circuits.

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TO THE HONORABLE SUPREME COURT:

Respondents Mary Lu Redmond and the Village of Hoffman Estates respectfully request that this Court deny the petition for Writ of Certiorari submitted by the Petitioner Carrie Jaffee.

OPINION BELOW

The decision of the Court of Appeals is reported at 51 F.3d 1346, and is reproduced in the Appendix to the Petition for Writ at pp. 1-24.

RULE INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence, which is set forth verbatim at Page 3 of the Petition for Writ.

STATEMENT OF THE CASE

On June 27, 1991, Hoffman Estates police officer Mary Lu Redmond was dispatched to the Canyon Estates Apartment Complex regarding a reported fight in progress. Shortly after arriving there, the officer shot and killed Ricky Allen, Sr. as he ran from the front door of one of the apartment buildings onto and upon the front lawn. Within days thereafter, decedent's family members brought suit contending that the officer had no lawful reason to shoot, since, in their view, Allen was unarmed and was not in any apparent position of causing death or bodily harm to anyone else. The officer and her municipal employer, on the other hand, maintained that Allen was armed with a knife and was chasing, and gaining on, another individual. Redmond shot Allen because it appeared to her that he was about to stab the person he was pursuing.

The plaintiff, Carrie Jaffee, is the mother of Ricky Allen, Sr. She, together with Lechia Allen, the divorced mother of Allen's two children, brought a three-count

complaint contending: (1) that Redmond's actions violated the decedent's federal constitutional right not to be subjected to unreasonable seizures nor to be deprived of life without due process of law; (2) that Redmond's actions were wilful and wanton, thereby entitling the decedent's next-of-kin to damages under Illinois' wrongful death statute; and (3) that Redmond deprived Ricky Allen's children of their federal constitutional right to associate with their father. At no time during the course of this litigation did the plaintiffs amend their complaint to add any further claims. The plaintiffs abandoned their third claim at trial. (See Transcript of Proceedings, Dec. 20, 1993, Record (hereinafter "R.") 167 at p. 665)

During the course of pretrial discovery, an issue arose over whether the plaintiffs' attorney would be permitted to obtain discovery regarding the content of numerous conversations between defendant Redmond and Karen Beyer, a licensed clinical social worker who held the position of Director of Health and Human Services for the Village of Hoffman Estates and to whom Redmond went for professional counseling following the shooting.[1] All of

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[1] As the Seventh Circuit noted in its decision, under Illinois law, a licensed clinical social worker provides "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." 225 ILCS 20/3 (1994). A licensed clinical social worker is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least three years of supervised post-master's clinical social work practice which shall include the provision of mental health services for the evaluation, treat-

(continued...)

Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during counseling sessions. The defense objected primarily on the grounds that such communications were privileged. As the Seventh Circuit would later acknowledge, these communications would clearly be privileged under state law if it were controlling. See A.P.W. at 21. However, given plaintiffs' federal claim, the analytical focus became Rule 501 of the Federal Rules of Evidence and whether its inherent flexibility would allow such a privilege to be recognized as a matter of federal law. This issue gave rise to numerous motions, evidentiary hearings, and Court rulings.

The plaintiffs initially sought to inquire directly of Redmond at her deposition regarding the content of her counseling sessions with Beyer. The defendant refused, however, contending that any such communications were privileged. (R. 64, 65) Plaintiff then directed a subpoena to Beyer to testify at deposition and to produce her curriculum vitae and "all notes, records, reports pertaining to

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[1] (...continued)
ment, and prevention of mental and emotional disorders." 405 ILCS 5/1-122.1 (1994). An individual cannot obtain a license to practice clinical social work until he or she passes an examination for the practice of clinical social work and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/9 (1994). Karen Beyer received her master's degree in social work from Loyola University in 1969. At the time of trial, she had had some twelve thousand hours of experience in individual, family, and marital psychotherapy, and had participated in clinical supervision in psychotherapy for doctoral psychology students from several psychology programs. See Appendix to Petition for Writ (hereinafter "A.P.W.") at pp. 5-6, n.3.

Mary Lu Redmond." (R. 64, Exh. A) Defendants moved to quash the subpoena, contending, once again, that any conversations occurring within the context of the counseling relationship, as well as any records, notes, or reports relating thereto, were privileged under both state and federal law. (R. 64, 65) The district court denied defendants' motion. (R. 67, 119-1) The plaintiffs then moved for an order to compel Redmond to appear for a third deposition session to answer questions about her conversations with Beyer. (R. 71) Over defendant's objection (R. 72), the court granted plaintiffs' motion. (R. 73, 117-1) This followup deposition then proceeded in the presence of a magistrate judge on May 11, 1992. (R. 78)

On June 23, 1992, Karen Beyer, through her attorney, filed a motion for reconsideration of the district court's previous rulings on the privilege issue. (R. 81) The defendants orally joined in this motion. (R. 117-2 at p.6) After the court denied this motion (R. 82, 117-2), Beyer was deposed. Plaintiffs' counsel then brought a motion to compel Beyer to answer certain questions to which objections had been made and to produce certain notes and documents. (R. 91) On September 30, 1992, the court granted this motion. (R. 92) Thereafter, plaintiffs moved the court for sanctions against Redmond, contending that her deposition answers relating to her conversations with Beyer were evasive and incomplete. Specifically, the plaintiffs sought an order barring Officer Redmond from testifying at trial. (R. 100) On December 10, 1992, the court held an evidentiary hearing, at which Redmond testified. (R. 106, 119-2) The court ruled that plaintiffs' counsel would be given further opportunity to depose Beyer and to review her notes. (R. 119-2 at pp. 41-54) Following this second installment of Beyer's deposition on January 26,

1993, plaintiffs then filed a second motion to compel Karen Beyer to answer certain questions. Specifically, plaintiffs requested an order permitting unrestricted inquiry into statements made by Redmond to Beyer and requiring the production of all of Beyer's notes. (R. 110) The court granted this motion on February 5, 1993. (R. 112, 119-3)

Plaintiffs next filed a motion for sanctions against the defendant contending that she had instructed Beyer to refuse to comply with the court's February 5, 1993 order. (R. 116) An evidentiary hearing was held on March 8, 1993, at which both Redmond and Beyer testified. (R. 114, 119-4) After the parties submitted written briefs as requested by the court (R. 119-4 at pp. 49-51; R. 121, 122, 123, 124, 125, 126, 128), Judge Shadur granted plaintiffs' motion on April 6, 1993. (R. 129) Specifically, the court ordered that Officer Redmond would be precluded from testifying at trial regarding her version of the event "because plaintiffs' attorneys have been blocked from effective cross-examination." The court also referred the matter of Beyer's non-compliance to the U.S. Attorney's Office for possible criminal contempt proceedings. (R. 129, 139, 130) The case was then set to commence trial on December 13, 1993. (R. 136)

On December 8, 1993, defendants filed a motion to reconsider and to vacate the court's order barring Redmond from testifying at trial. (R. 142) By this time, there had been no finding of contempt entered by any judicial officer against Karen Beyer following the district court's referral order. (R. 142 at p. 3) On December 10, 1993, the court granted defendants' motion, but with the proviso that the jury would be informed that it could draw an inference that the records, notes, and documents which

had not been produced by Beyer would have contained information unfavorable to the defendants. (R. 143; R. 165 at p.13)

At trial, the plaintiffs called as a witness during their case-in-chief the defendant Redmond, and, over the standing objection of the defendant, (R. 169 at pp. 4-10, 17) interrogated her with regard to her conversations with Beyer. (R. 169 at pp. 17-32) Plaintiffs' counsel also called Beyer as a witness, and, once again over defendants' objection, examined her with regard to those conversations as well as her notes and records. (R. 169 at pp. 32-46)

At the jury instruction conference held on December 20, 1993, defendant objected to the court giving plaintiffs' instruction No. 8, which addressed the conversations between Redmond and Beyer and informed the jury, inter alia, that it was entitled to presume that the contents of Beyer's notes would be unfavorable to both Redmond and to the Village. (R. 167 at pp. 630-636; A.P.W. 67, 68)

The jury returned its verdict on December 22, 1993, awarding the plaintiffs $45,000.00 on Count I (the federal constitutional violation) and $500,000.00 on Count II (the state wrongful death claim). Judgment was entered on the verdict the same day.

On defendants' appeal, the Seventh Circuit recognized the existence of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence, and held that the district court had erred in refusing to recognize that privilege and in requiring disclosure of the content of any of the counseling conversations between Officer Redmond and Karen Beyer. The Court accordingly reversed and remanded the case for new trial.

In this petition, the plaintiffs argue that the Seventh Circuit's decision conflicts with decisions from other circuits regarding the existence of a psychotherapist/patient privilege under Rule 501. Plaintiffs also contend that the decision is overbroad in its scope. However, a comparison of the Seventh Circuit's decision with those from other circuits which, it is urged, do not recognize the privilege reveals that there is no actual conflict sufficient to warrant review by this Court. Furthermore, analysis of the Seventh Circuit's language in recognizing the privilege within the legal and factual context of this case discloses that the decision is in harmony with this Court's directives regarding the flexible development of the federal law of privilege under Rule 501. Therefore, certiorari should be denied.

REASONS TO DENY THE WRIT

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict where none, in fact, exists. Their perception of conflict arises from their own overbroad framing of the issue, which induces them to: (1) ignore or overlook this Court's observations and admonitions concerning the flexible development of the law of privilege under Rule 501 of the Federal Rules of Evidence; (2) ignore the vastly differing factual and legal contexts within which other circuits have addressed the existence and applicability of a psychotherapist/patient privilege; and (3) ignore explicit language contained within the decisions of the various circuits which serves to define and narrow the scope of those decisions and thereby eliminate any conflict except at the most superficial, non-controlling level of analysis.

The petitioners' suggestion that the Seventh Circuit caved in to a demand to recognize some far-reaching psychotherapist/privilege applicable to all mental health care providers in all contexts is completely devoid of merit on all counts. For one thing, the respondent's argument below was fact-specific. Officer Redmond, who never interjected her own state of mind as an issue into this 42 U.S.C. §1983 deadly force case, claimed a privilege with regard to confidential communications she had with a licensed clinical social worker during professional counseling sessions that followed the shooting. In their present writ, petitioners painstakingly avoid mention of certain of these specifics. For example, petitioners have studiously omitted any acknowledgement of Karen Beyer's actual professional calling and title as a licensed clinical social worker, choosing instead to gloss over her considerable (and undisputed) professional background and training by referring to her simply as "a social worker" in the hope of buttressing their contention that "mere social workers" are not worthy of privilege consideration under Rule 501. Perhaps even more disturbing is petitioners' troubling omission of the fact that all of Redmond's conversations with her counselor took place within the confines of formal, professional counseling sessions. The petitioners' "Statement" only informs that ". . . respondent Redmond had discussed the shooting with Karen Beyer, a social worker employed by the respondent Hoffman Estates," (See Petition, p. 4 et seq.) thereby conveying the impression that some, or all, of these conversations could have occurred outside the bounds of their strictly professional relationship. The record establishes otherwise.

While petitioners decry the Seventh Circuit's decision for supposedly conflicting with the law of five other circuits and for going too far in extending the privilege to mental health care providers not bearing the nomenclature "psychiatrist" or "clinical psychologist," a more-than-cursory analysis of the Court's opinion discloses several glaring instances of shortsightedness on petitioners' part. First, the Court's decision is, in actuality, quite narrow. The Seventh Circuit noted, for example, that the psychotherapist/patient privilege being recognized ". . . protects only confidential communications, i.e. all the information learned by the psychotherapist or counselor during treatment that is necessary for treatment." (A.P.W. 21, n.18.) While the Court did go on to note that the privilege extends to mental health care providers other than psychiatrists and psychologists, the Court made clear, in the same breath, that it was confining the privilege to the context of formal counseling. (A.P.W. 22-23, n.19.) Secondly, the Court explicitly limited its holding to the facts of the present case: ". . . We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature, where the balance of the competing interests tips sharply in favor of the privilege. . ." (A.P.W. 22.) Thirdly, the Court noted that the decisions emanating from other circuits that had "rejected" the privilege involved "factual situations not even remotely similar to the one before this Court." (A.P.W. 16.)

A brief review of the decisions from the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits amply bears out the Seventh Circuit's observations, and serves to highlight even more distinguishing features.

Petitioners' reliance on *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984) to demonstrate conflict is dubious at best. First, the factual context of the case differs markedly. Interestingly, the district court in that case did recognize a privilege, albeit based on state law. Even more interesting is the Fourth Circuit's statement that ". . . the district court should have admitted the conversations pursuant to the well-settled federal rule that such communications are not privileged." *Slakan*, 737 F.2d at 377. Contrary to this off-hand remark, the rule could not have been "well settled" in the Fourth Circuit if the Court had to cite a Fifth Circuit decision as its authority. *Slakan's* own value as a statement of "well-settled" law is highly questionable. It has not been cited as authority for this particular proposition in any subsequent Fourth Circuit case.[2] Secondly, its value as precedent is rendered even more doubtful by virtue of the Fifth Circuit's own equivocation with respect to the supposed rejection of the privilege, as will be more fully developed in the next paragraph. Thirdly, the Court of Appeals found the district court's error in relying on state privilege law harmless, insofar as the evidence that was shielded by the privilege was merely cumulative and thus did not prejudice the

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[2] The District Court of Utah did look to *Slakan* for non-recognition of the privilege in *Parsons v. Weber County*, 151 F.R.D.130 (D.Utah, C.D. 1993), but ruled, in the case before it, that it would have been premature to decide whether a psychotherapist/patient privilege existed in its Circuit, and that such a ruling would have been unnecessary to a resolution of the case. The court further observed that, ". . . However, (the doctor) should not be questioned about communications between (another prisoner) and the doctor. Such communications could be subject to a psychotherapist/patient privilege." 151 F.R.D. at 132.

privilege-opponent's attempt to present their case. Finally, *Slakan* was decided in 1984. As the Seventh Circuit noted in the present case, ". . . [M]uch has changed with the mental health field in the past five years." (A.P.W. 17.)

Petitioners look to *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) for the Fifth Circuit's supposedly conflicting view. Once again, however, the factual setting of the case differs considerably, as Dr. Moore, a psychiatrist, was attempting to assert a privilege to prevent the IRS from reviewing his accounts receivable records as part of its efforts to collect over $1 million in delinquent taxes, interest, and penalties. While the Court rejected Dr. Moore's argument to adopt a doctor-patient privilege in this setting, the Court left open the possibility that the Fifth Circuit could or may recognize a privilege in a different case. 970 F.2d at 50 (". . . [T]hus, even were this Circuit to adopt a psychotherapist-patient privilege, the information sought by the summons in this case would fall outside the perimeter of its protection," citing *John Doe v. Diamond*, 964 F.2d at 1329 (2d Cir. 1992) and *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).)[3] The panel which decided *Moore* was hesitant to overrule earlier decisions of another panel, since controlling authority dictated that this could only be decided by the full Court sitting en banc. Here, Dr. Moore did not apparently petition for such an en banc consideration or reconsideration. As a result, the *Moore* decision can hardly be characterized as embodying an unshakable rejection of the psychotherapist/patient privilege. If *Moore* represents the current state of affairs in the Fifth Circuit, all the more reason to doubt petitioners' reading of the status quo in the Fourth Circuit, as suggested in the preceding paragraph.

[3] *Doe* and *Zuniga* were both addressed by the Seventh Circuit in the present case, and are presented by the petitioners as the authorities underscoring the Second and Sixth Circuits' recognition of the psychiatrist-patient privilege.

Petitioners next point to *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989) to illustrate conflict with the Ninth Circuit. Once again, their analysis looks right past the limited holding of that court, which focused upon the recognition of a psychotherapist/patient privilege in a criminal context. 867 F.2d at 564. Like the Fifth Circuit, the Ninth also suggests that it could or may find such a privilege applicable in other contexts, and in particular in a civil litigation setting, since the court had previously found a substantial constitutional right of privacy extending to psychotherapist-patient communications. Id. at 565. Here, the court explicitly distinguished the present case from those other settings on the grounds that it involved an investigation related to the federal crime of murder.

As for *U.S. v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994), which is presented to this Court as the Tenth Circuit's statement of position, petitioners again ignore the precise issue before the court, which was whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context. 17.F.3d at 1301, 1302. The court did not venture beyond those parameters. Id. at 1302. Interestingly, one of the circuit judges on the panel which decided *Burtrum* was John C. Godbold of the Eleventh Circuit, sitting by designation, just as he did in the case now before the Court. Id. at 1300; see also A.P.W. 1. Had Judge Godbold felt there was no way to reconcile the Seventh Circuit's decision in *Jaffee* with the Tenth Cir-

cuit's *Burtrum* decision, surely he would have so stated in dissent.

Lastly, petitioners urge conflict with the Eleventh Circuit based on *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992). However, once again, they have overlooked several key points. First, the evidence of past psychiatric treatment in that case was directly related to plaintiff's claims for damages because of mental anguish, anxiety, depression, and humiliation, and it was for that specific reason that the court allowed the evidence in. 967 F.2d at 467. Unlike Ms. Hancock, Officer Redmond did not, at any time, place her state of mind or of emotional well-being in issue, nor were such matters ever material to the plaintiff's limited federal claim. Secondly, while the court declined to apply any privilege in the context before it, it nonetheless acknowledged that its ". . . holding does not derogate the fact that Rule 501 'clearly provides federal courts with the statutory power to recognize new or novel evidentiary privileges.' " Id. at 467, n.9. Finally, the Eleventh Circuit is Judge Godbold's home circuit, and thus, he was in a unique position to develop, via a dissenting opinion, a rationale to counter that of his fellow panel members based upon his home circuit's experience in grappling with the privilege issue. However, he concurred, and in so doing, signalled that the two arguably conflicting decisions were in fact harmonious.

Thus, the premise contained in the first of petitioners' "Questions Presented" is completely undermined. While that in and of itself should suffice to turn aside the second question posed, additional justification rests in the very fact that none of the supposedly conflicting decisions of the other circuits appears to involve the question of extending the privilege to mental health care providers

other than psychiatrists or psychologists. While the *Burtrum* case alone refers to the relevant actor only as a "psychotherapist," the remaining cited cases all clearly refer to psychiatrists and psychologists.

Finally, contrary to petitioners' urgings, the Seventh Circuit did not disregard this Court's cautious approach to expansion of the federal law of privilege. The Appeals Court explicitly acknowledged that "[e]videntiary privileges in litigation are not favored," citing to *Herbert v. Lando*, 441 U.S. 153 (1979), and that "Whatever their origins, these exceptions to the demand for everyman's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth," citing to *United States v. Nixon*, 418 U.S. 683 (1974). (A.P.W. 22.) But the court was likewise cognizant of this Court's statement in *Trammel v. United States*, 445 U.S.40 (1980) that Rule 501 manifests an affirmative intention not to freeze the law of privilege, but that its purpose was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis by examining whether the privilege promotes sufficiently important interests to outweigh the need for probative evidence in the administration of justice. The Seventh Circuit's decision was clearly consistent with these principles, and should not be disturbed. Further review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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